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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1596

COMMONWEALTH OF PENNSYLVANIA, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

BRIEF OF INDENTURE TRUSTEE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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July 12, 1972

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Respondent Manufacturers Hanover Trust Company (the Trust Company) is Indenture Trustee of the General Mortgage Bonds of the Debtor The Central Railroad Company of New Jersey. Said bonds are in default with respect to principal and interest in an amount in excess of $50,000,000, and the Trust Company has actively participated as a party intervenor in these reorganization proceedings since their inception in March, 1967. The Trust Company submits this brief in opposition to Petitioners' Petition for a Writ of Certiorari to review the judgment and opinions of the United States Court of Appeals for the Third Circuit, entered in this proceeding on March 10, 1972.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The Trust Company concurs in the Counterstatement of Questions Presented as stated in the opposing briefs filed in this proceeding by the Reorganization Trustee, Mr. R. D. Timpany, and by the 3¼% Mortgage Bondholders Protective Committee.

COUNTERSTATEMENT OF THE CASE

The Trust Company concurs in the Counterstatement of the Case as stated in the aforesaid two opposing briefs.

ARGUMENT

I. As To Order No. 451 Of The Reorganization Court, The Petition For A Writ Of Certiorari Does Not Contain Any Complaint Whatever Of Error, Conflict With Other Precedents Or Damage To The Petitioners; And In This Respect At Least The Petition Is A Nullity.

The Reorganization Court's Order No. 451, as affirmed by the Circuit Court (Petition for a Writ, etc., pp. 3a-4a, 7a-8a, 12a-13a) deals exclusively with the abandonment of ten small and inactive segments of the Debtor's railroad operations, five in New Jersey and five in Pennsylvania (*ibid*, p. 3). Specifically, the Reorganization Court authorized the Reorganization Trustee to carry out previous orders of the Interstate Commerce Commission which had been entered by the Commission pursuant to conventional bilateral action under the Interstate Commerce Act, 49 U.S.C. § 1(18)-1(20), and the Bankruptcy Act, § 77(o), 11 U.S.C. § 205(o) (*ibid*, pp. 1b-3b).

Whereas the major question necessarily involved in abandonment proceedings before the *Commission* is whether the proposed abandonment be consistent with the "public necessity and convenience," 49 U.S.C. § 1 (18), *Colorado* v. *United States*, 271 U.S. 153, 168 (1926), the only issue presented on an appeal from the *Reorganization Court's*

action in approving an abandonment is whether the Reorganization Court has properly exercised its discretion in reaching its determination based upon the financial consequences to the Debtor itself and its creditors. Cf. *New Haven Inclusion Cases,* 399 U.S. 392, 435 (1970); *Railroad Credit Corp.* v. *Ecker,* 152 F.2d 418, 421 (9th Cir. 1945).

The Petition for a Writ of Certiorari contains no argument whatever directed to this particular issue, or in fact to any aspect of Order No. 451. The "Questions Presented" (*ibid,* p. 2) are confined to the restraint and the suspension of operations which are mandated in the other order cited in the Petition (Order No. 445, *ibid* p. 1a-3a); and the Petition's legal argument (*ibid,* pp. 7-12) follows exactly the same pattern.

Moreover, the Petition's "Statement" (*ibid,* pp. 3-6) not only makes no attempt to show injury to the Petitioners arising from the Reorganization Court's Order No. 451 but also clearly shows that appellate proceedings implicating the ten abandonments and the correctness of the Commission's determination are now pending elsewhere.

In the light of the requirements of Rule 19 of the Revised Rules, this Court should totally disregard, and of course deny, the Petition insofar as it involves Order No. 451.

If it were somehow possible to read into the Petition any question concerning Order No. 451, the Trust Company would concur in the Brief in Opposition filed by the Reorganization Trustee in these proceedings, to the effect that such question would be abstract and moot.

II. The Restraint Provision Of Order No. 445 Is Consistent With Prior Precedents Of This Court And Other Federal Courts And Federal Statutes.

In view of the need for speed, economy of effort and most particularly a seasoned understanding of the Debtor's

fundamental problems, we submit that much harm could be done by submitting to any court (or especially a multiplicity of courts) except the Reorganization Court, and to the local rules of procedure of any court or courts except those of the Reorganization Court, any judicial questions arising out of the present circumstances. Sensible application of procedural requirements, expedition of discovery, ready availability of records and witnesses, economy in the use of time and travel, assistance of experienced counsel, judicial background knowledge, and above all a sense of immediacy are, we submit, essential to the Debtor's salvation.

An order granting an injunction to protect the jurisdiction of a railroad reorganization court in diverse circumstances is well within the power of the court, as most recently exemplified by the current Penn Central litigation in the Circuit Court which heard the pending matters. See *In re Penn Central Transportation Company*, 446 F.2d 1109 (3rd Cir. 1971, per McLaughlin, Aldisert and Gibbons, JJ.), *cert. den.* U.S. (1971):

> "But the teachings of these cases [prior cases of the United States Supreme Court based upon diverse situations] do not preclude the reorganization court from 'enjoin[ing] the prosecution of any suit which would take from it the decision of any question which it has the duty to decide in connection with the reorganization or which would hamper it in any way in exercising the power imposed upon it.' *In re Imperial "400" National, Inc.*, 429 F.2d 671, 677 (3rd Cir. 1970)." *In re Penn Central Transportation Company, ibid.* at 1112.

A strong predilection for the primacy of the Reorganization Court was shown in the *New Haven Inclusion Cases, supra.*, 399 U.S. at 426, wherein Justice Stewart ruled that a three-judge court which technically possessed jurisdiction of a reorganization issue should better have declined to exercise that jurisdiction.

The Petition cites and quotes 28 U.S.C. §§ 1398(a) and 2325 as the venue basis for a three-judge court's review of those Commission orders which have already been issued (and perhaps anticipated future orders as well) in the Debtor's abandonment proceedings. (Petition for a Writ, etc., pp. 36-46).

Significantly, both § 1398(a) and 28 U.S.C. § 2284, to which § 2325 refers, expressly make exceptions for situations covered by other congressional enactments.

There is, in the present circumstances, another pertinent federal law which states such an exception but which the Petition does not even cite, i.e. 28 U.S.C. § 1398(b), as follows:

> "(b) A civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, an order of the Interstate Commerce Commission made pursuant to the referral of a question or issue by a district court or by the Court of Claims, shall be brought only in the court which referred the question or issue. As amended Aug. 30, 1964, Pub. L. 88-513, § 2, 78 Stat. 695."

The foregoing section was enacted in 1964 (P.L. 88-513) and renders obsolete the older cases cited by petitioners such as *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134 (1946). Congress' purpose in enacting this venue provision was explicitly to keep Commission matters within the control of the referring court. Congress felt that the history of the prior act demonstrated both that the expertise of the referring court was being frustrated and that unnecessary delay was being tolerated in courts which lacked the referring court's sense of urgency. See 1964 U.S. Code Cong. and Adm. News, p. 3235 for the legislative history; see also *Leonard Bros. Trucking Co.* v. *U.S.*, 301 F. Supp. 893 (S.D. Fla., 1969); *H. Messick, Inc.* v. *Baggett Transportation Co.*, 268 F. Supp. 459 (W.D. Mo. 1967).

Very clearly the abandonment proceedings are "a question or issue" referred by the Reorganization Court to the Commission. Section 77(o), 11 U.S.C. § 205(o),

in fact, requires such a reference and the Reorganization Court has been guided by that section. It follows that the Reorganization Court has exclusive statutory venue of Commission orders in the abandonment proceedings, and no other court should act, even without regard to Order No. 445.

Finally, as noted in the Reorganization Trustee's brief, the Petitioners did in fact comply with the restraint provision of Order No. 445 by applying for leave to pursue their then-pending action for a three-judge court in the Middle District of Pennsylvania with respect to only ten specific abandonment orders. Their real quarrel, therefore, is with still another order of the Reorganization Court (Order No. 454, Reorganziation Trustee's Brief in Opposition, p. 7a), by which such leave was denied. The Petitioners do not allege that they have any direct and immediate interest in appealing to any three-judge court any of the various other abandonment orders of the Commission. On the contrary, see the statement at page 7 of the Petition:

> "The Commission's decision to allow the *10 abandonments* was entered under the provisions of the Interstate Commerce Act, and review of *its decision* must be in a statutory court composed of three judges. [emphasis added]"

III. The Suspension-Of-Operations Provision Of Order 445 Is Also Consistent With Prior Precedents.

The Trust Company concurs in the opposing briefs of the Protective Committee and the Reorganization Trustee both as to the correctness of the Reorganization Court's discretion in ordering suspension of the Debtor's operations in Pennsylvania and as to the mootness of any appellate proceedings touching this portion of the Order, now that the fact is not only an accomplished one* but also substantially confirmed by the Commission.

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* Petitioners' application for a stay was denied by Mr. Justice Stewart on March 27, 1972. (Petition for a Writ, etc., p. 6)

Clearly the Interstate Commerce Commission has a role to play in the process of freeing railroads (whether solvent or bankrupt) from improvident operations. 49 U.S.C. 1(18)-1(20); 11 U.S.C. 205(o).

In the case of abandonments affecting bankrupt and desperately deficit-ridden railroads, however, judicial deference to the Commission on questions of public interest may beg the ultimate question; since whenever continued operations of the railroad result in inexorable erosion of the estate, the decisive consideration must at some point become not what the public interest requires but rather who is going to pay for it, to wit:

> "whether the time is . . . foreseeable in the near future when the continued deficit operation . . . in the public interest at the expense of the creditors must be held to be a taking of their property without due process or just compensation, in violation of the Fifth Amendment. . . ." *In re New York, N.H. & H.R.R. Co.*, 289 F. Supp. 451, 454 (D. Conn. 1968) (Reorganization Case I).

The remedy of partial cessation which was granted by the order now in issue is in fact much milder (from the public's point of view) than the "constitutional right * * * to cease operation and liquidate" which was confirmed by the New Haven three-judge court, *N.Y., N.H. & H.R. Co., Bondholders' Committee* v. *United States*, 289 F. Supp. 418 (S.D.N.Y. 1968). Circuit Judge Friendly wrote:

> "We see no reason to question the validity of Justice Holmes" decision in Brooks-Scanlon Co. v. Railroad Commission, 251 U.S. 396, 40 S.Ct. 183, 64 L.Ed. 323, forbidding the State of Louisiana to require a railroad to continue its deficit operation with no hope for profits in the foreseeable future. See also, Mora v. Mejias, 223 F.2d 814 (1 Cir. 1955); Railroad Commission v. Eastern Texas R. R., 264 U.S. 79, 85, 44 S.Ct. 247, 68 L.Ed. 569 (1924); Bullock v. State of Florida ex rel. Railroad Commission, 254 U.S. 513, 41 S.Ct. 193, 65 L.Ed. 380 (1921); cf. Pacific Telephone & Teleg. Co.

v. Tax Comm'n, 297 U.S. 403, 413, 56 S.Ct. 522, 80 L.Ed. 760 (1936). We cannot accept the argument that all this was changed by the addition of § 1 (18), requiring the Commission's consent to abandonement, to the Interstate Commerce Act by the Transportation Act, 1920, or by the enactment of § 77 of the Bankruptcy Act in 1933. These statutes were designed to assure orderly procedures and to afford methods that might avoid the ultimate solution; they were not intended to override constitutional guarantees, cf. In re Third Avenue Transit Corp., 198 F.2d 703, 707 (2 Cir. 1952), and would not be effective if they had been. [footnote omitted]" 289 F. Supp. at 440-441.

Even as a matter of simple statutory construction, courts have permitted cessation of services without prior Commission approval on the general theory that:

> "To 'abandon' within the context of the statute means to give up permanently, not merely to suspend operations. No Commission approval is necessary where the cessation of operations results not from the volition of the railroad but as a result of conditions over which the railroad has no control." *Myers* v. *Arkansas & Ozarks Ry. Corp.*, 185 F. Supp. 36, 41 (W.D. Ark. 1960) citing *Zirn* v. *Hanover Bank*, 215 F.2d 63 (2nd Cir. 1954).

If damage due to severe weather (as in *Myers*) or the exercise of creditors' statutory rights (as in *Zirn*) justify cessation of operations without awaiting the technicality of Commission certification, *a fortiori* the constitutional rights of the Debtor and its creditors should not be thwarted by technicality.

On appeal, the discretion, indeed the expertise, of a reorganization court is entitled to special deference. *New Haven Inclusion Cases, supra.*, 399 U.S. at 435; *Railroad Credit Corp.* v. *Ecker, supra.*, 152 F.2d at 421 (9th Cir.

1945); *Chicago & N. W. Ry. Co.* v. *United States*, 52 F. Supp. 65, 67 (N.D. Ill. 1943), *aff'd per curiam*, 320 U.S. 718 (1943). Admittedly, the judiciary has no apothecary's scale by which to measure the degree of confiscation sufficient to constitute a Fifth Amendment violation. A balancing of all factors known to the experienced Reorganization Court is all that can be required.

The Petitioners make no attempt to controvert the Reorganization Court's determination that the welfare of the Debtor's estate required a partial cessation of operations. Nothing in the record, certainly, induced the experienced and intimately knowledgeable Reorganization Court to paint a false dawn or see any brightness of light at the end of the tunnel, as it hypothesized in December, 1971, the situation on April 1 next. Quite the contrary, as late as October 26, 1971, the Reorganization Court said:

> "What bothers me, and bothers me very much, is the losses resulting from operations month after month. And I will not allow this condition to continue indefinitely. * * * I want to make it crystal clear to all concerned that I do not intend to sit on this bench and see the debtor's estate consumed by continued operating losses."

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to review the judgments and opinions of the Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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